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**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA – SOUTHERN DIVISION**

MARSHALL S. SANDERS and  
LYDIA O. SANDERS AS TRUSTEE  
OF THE MARSHALL AND LYDIA  
SANDERST TRUST DATED APRIL  
20, 1990,

Plaintiffs,

vs.

BANK OF AMERICA, N.A.; WELLS  
FARGO BANK, N.A., AS TRUSTEE,  
ON BEHALF OF THE HOLDERS OF  
THE HARBORVIEW MORTGAGE  
LOAN TRUST MORTGAGE LOAN  
PASS-THROUGH CERTIFICATES,  
SERIES 2007-1; NATIONAL  
DEFAULT SERVICING  
CORPORATION; SELECT  
PORTFOLIO SERVICING, INC.; and  
DOES 1-20,

Defendants.

CASE NO. 8:15-cv-00935-AG-AS

**BANK OF AMERICA, N.A.'S  
NOTICE OF MOTION AND  
MOTION TO DISMISS;  
MEMORANDUM OF POINTS AND  
AUTHORITIES**

**[Filed Concurrently with Request for  
Judicial Notice and Proposed Order]**

DATE: September 21, 2015  
TIME: 10:00 a.m.  
DEPT.: 10D

Complaint Filed: June 11, 2015

TO ALL PARTIES AND THEIR COUNSEL OF RECORD, THE  
CLERK OF THE ABOVE-ENTITLED COURT, AND THE HONORABLE  
UNITED STATES DISTRICT COURT:

**PLEASE TAKE NOTICE** that on September 21, 2015, at 10:00 a.m., or as  
soon thereafter as counsel can be heard, in Courtroom 10D of the above-entitled

1 court, located at 411 West Fourth Street, Santa Ana, California 92701, Defendant  
2 Bank of America, N.A. will, and hereby does, move this Court for an order  
3 dismissing each claim alleged in Plaintiffs' Complaint pursuant to Rule 12(b)(6) of  
4 the Federal Rules of Civil Procedure.

5 This motion is based upon this Notice and Motion, the Memorandum of  
6 Points and Authorities, the concurrently filed Request for Judicial Notice, the  
7 pleadings and records on file, and such further written or oral evidence as may be  
8 presented at the time of hearing.

9 This motion is made after conferring with counsel for Plaintiffs, pursuant to  
10 Local Rule 7-3, which took place on July 22, 2015. The conference did not obviate  
11 the need for the instant motion.

12  
13 DATED: July 23, 2015

Respectfully submitted,

14 MCGUIREWOODS LLP  
15

16  
17 By: /s/ Adam F. Summerfield  
18 Adam F. Summerfield  
19 Attorneys for Defendant  
20 Bank of America, N.A.  
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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

Plaintiffs Marshall S. Sanders and Lydia O. Sanders as Trustee of the Marshall and Lydia Sanders Trust Dated April 20, 1990 ("Plaintiffs") bring the present Complaint against Bank of America, N.A. ("BANA"), along with co-Defendants Wells Fargo Bank, N.A. ("Wells"), National Default Servicing Corporation ("NDS"), and Select Portfolio Servicing, Inc. ("SPS"), claiming a variety of improprieties in the commencement of foreclosure proceedings against Plaintiffs' property. Plaintiffs' allegations appear to be borne of their dual theories that (i) after obtaining a \$1.4 million loan in December of 2006, they rescinded the loan in February of 2010 and should be entitled to the property free of any encumbrances; and (ii) that two duly recorded assignments of their deed of trust were fraudulent and invalid. However, Plaintiffs' theories are regularly rejected by state and federal courts throughout California, have no basis in law or in fact, and are merely another attempt to delay a trustee's sale on their property. As shown below, Plaintiffs cannot state any claim against BANA. Accordingly, BANA respectfully requests that this Court grant its Motion to Dismiss in its entirety, without leave to amend.

**II. SUMMARY OF COMPLAINT AND JUDICIALLY NOTICEABLE FACTS**

Plaintiffs' allegations concern the real property located at 1621 Kensing Lane, Santa Ana, California 92705 (the "Property"). *See* Compl., ¶ 2. On December 26, 2006, Plaintiffs obtained a loan for \$1.435 Million (the "Loan") from Countrywide Bank, N.A. ("Countrywide") in order to refinance the Property. *Id.*, ¶ 10. In connection with the Loan, Plaintiffs executed a Note in the principal amount of \$1.435 Million, payable to Countrywide. Compl., ¶ 16; Deft's Req. for Judicial

1 Notice ("RJN"), ¶1, Ex. A. As security for the Loan, Plaintiffs also executed a Deed  
 2 of Trust secured by the Property. RJN, ¶ 2, Ex. B.<sup>1</sup> The Deed of Trust identifies  
 3 Countrywide as the lender (*id.*, at p.2, ¶ (C) thereto), and identifies MERS as a  
 4 nominee for the lender and as the beneficiary under the Deed of Trust. *Id.*, at p.2, ¶  
 5 (E) thereto.

6 On December 30, 2009, an Assignment of the Deed of Trust from MERS, as  
 7 nominee for Countrywide and as beneficiary under the Deed of Trust, to Wells  
 8 Fargo Bank, N.A., as Trustee for Harborview Mortgage Loan Trust Mortgage Loan  
 9 Pass-Through Certificates, Series 2007-1 ("ADOT 1") was recorded in the Orange  
 10 County Recorder's Office. Compl., ¶¶ 27-28; RJN, ¶ 3, Ex. C.

11 Plaintiffs allege that on February 17, 2010, they sent a "Letter of Rescission"  
 12 to Countrywide, BANA, and Wells Fargo, requesting that these entities "cancel the  
 13 Loan and release its [sic] security interest in said property." Compl., ¶¶ 19-20.

14 On December 6, 2011, an Assignment of the Deed of Trust from Wells Fargo  
 15 Bank, N.A., as Trustee for Harborview Mortgage Loan Trust Mortgage Loan Pass-  
 16 Through Certificates, Series 2007-1 to BANA ("ADOT 2") was recorded in the  
 17 Orange County Recorder's Office, evidencing the assignment of the Deed of Trust  
 18 to BANA. Compl., ¶¶ 31-32; *see also* RJN, ¶ 4, Ex. D.

19 At some point prior to March 5, 2013, the servicing of Plaintiffs' Loan  
 20 transferred to SPS. *See, e.g.*, RJN, ¶ 5, Ex. E, at p.2 thereto. On March 5, 2013,  
 21 SPS caused to be recorded a notice of default in the Orange County Recorder's  
 22 Office, indicating that Plaintiffs had failed to make the payment which became due  
 23 on April 1, 2009, along with all subsequent installments, and that Plaintiffs'  
 24 arrearage as of March 5, 2013, was \$341,963.57. RJN, Ex. E. Plaintiffs failed to  
 25

26 <sup>1</sup> Copies of these loan documents – the documents that Plaintiffs assert they never  
 27 received – are also attached to Plaintiffs' Complaint as Exhibits A and B.  
 28



1 cure their outstanding indebtedness, and a notice of trustee's sale was recorded in  
 2 the Orange County Recorder's Office on October 29, 2014, indicating that the  
 3 estimated unpaid balance on Plaintiffs' Loan was \$1,970,340.44. RJN, ¶ 6, Ex. F.  
 4 The trustee's sale was set for November 24, 2014 at 12:00 p.m. *Id.*

5 On November 21, 2014, Plaintiffs filed suit against BANA, NDS, and SPS in  
 6 Orange County Superior Court, asserting four of the five claims asserted in this  
 7 instant case. RJN, ¶ 7, Ex. G. Plaintiffs obtained a temporary restraining order  
 8 prohibiting the sale of the Property (*id.*, ¶ 8, Ex. H), and at a hearing on Plaintiffs'  
 9 motion for a preliminary injunction on May 18, 2015, the court in that action  
 10 granted the injunction, conditioned upon Plaintiffs first posting a bond of  
 11 \$35,000.00. *Id.*, ¶ 9, Ex. I. Plaintiffs failed to post the required bond by the  
 12 deadline (*id.*, ¶ 10, Ex. J), and instead filed a request for dismissal of that action  
 13 without prejudice on June 9, 2015. *Id.*, ¶ 11, Ex. K.

14 Plaintiffs then filed the Complaint in the instant case on June 11, 2015, and  
 15 sought another temporary restraining order from the Court (Dkt. No. 2), which was  
 16 denied. Dkt. No. 10. In this Complaint, Plaintiffs have brought claims against  
 17 BANA for: (i) Rescission under the federal Truth in Lending Act, 15 U.S.C. § 1635  
 18 *et seq.* ("TILA"); (ii) Cancellation of Instruments; (iii) Violation of California's  
 19 Unfair Competition Law ("UCL"); (iv) Violations of Sections 2924(a)(6) and  
 20 2924(f)(3) of the California Civil Code; and (v) Violations of Sections 2923.5 and  
 21 2923.55 of the California Civil Code. For the reasons detailed below, Plaintiffs'  
 22 claims are based upon flawed legal theories and lack any basis in fact. Accordingly,  
 23 the Court should dismiss Plaintiffs' claims with prejudice.

### 24 **III. STANDARD OF REVIEW**

25 A Rule 12(b)(6) motion tests the legal sufficiency of the claims asserted in the  
 26 complaint. A Rule 12(b)(6) dismissal is proper only where there is either a "lack of  
 27 a cognizable legal theory," or "the absence of sufficient facts alleged under a  
 28 cognizable legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th

1 Cir. 1988). The court must accept all factual allegations pleaded in the complaint as  
 2 true, and construe them and draw all reasonable inferences from them in favor of the  
 3 nonmoving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir.  
 4 1996). However, the court need not, however, accept as true unreasonable  
 5 inferences or conclusory legal allegations couched in the form of factual allegations.  
 6 *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

7 Furthermore, to satisfy Rule 8 of the Federal Rules of Civil Procedure, a  
 8 complaint fails to state a claim and must be dismissed if it does not “indicate which  
 9 individual defendant or defendants [are] responsible for which alleged wrongful  
 10 act.” *In re Sagent Tech., Inc., Derivative Litig.*, 278 F. Supp. 2d 1079, 1094 (N.D.  
 11 Cal. 2003).

#### 12 **IV. PLAINTIFFS’ TILA CLAIM MUST FAIL.**

13 Plaintiffs’ rescission claim is barred on its face. Specifically, “a borrower’s  
 14 right to rescind a loan transaction under TILA expires three years after the date of  
 15 consummation of the transaction or upon the sale of the property, whichever occurs  
 16 first.” *Snell v. Deutsche Bank Nat’l Trust Co.*, 2015 U.S. Dist. LEXIS 39570, at \*14  
 17 (E.D. Cal. Mar. 26, 2015). Furthermore, “the three year period for TILA rescission  
 18 claims is an ‘absolute’ statute of repose that cannot be tolled.” *Pratap v. Wells*  
 19 *Fargo Bank, N.A.*, 63 F. Supp. 3d 1101, 1112 (N.D. Cal. 2014). Plaintiffs’ loan was  
 20 consummated on or about December 26, 2006. Compl., ¶ 14; RJN, Exs. A-B.  
 21 Plaintiffs admit that they did not send their purported “Letter of Rescission” until  
 22 February 17, 2010. Compl., ¶ 19. Accordingly, the claim is time-barred.

#### 23 **V. PLAINTIFFS’ GENERALIZED ALLEGATIONS RELATED TO** 24 **SECURITIZATION AND ASSIGNMENTS OF THE DEED OF TRUST** 25 **CANNOT SUPPORT A CAUSE OF ACTION.**

26 As can best be discerned, Plaintiffs’ remaining claims appear to be premised  
 27 upon various standing and securitization theories. If Plaintiffs base the claims on  
 28 the allegations that any assignments, notices of default, or notices of sale were

1 invalid because various entities lacked any interest in, or were not in possession of,  
 2 the Note (*see, e.g.*, Compl., ¶¶ 29a-b, 33f-g, 36i, 36k, 49, 51), the claims must fail.

3 Such theories have been readily and repeatedly rejected by state and federal  
 4 courts in California, such as the Court in *Jenkins v. JPMorgan Chase Bank, N.A.*,  
 5 which held:

6 Because a promissory note is a negotiable instrument, a borrower  
 7 must anticipate it can and might be transferred to another creditor....  
 8 [The] assignment merely substituted one creditor for another, without  
 9 changing [the borrower's] obligations under the note. As an unrelated  
 10 third party to the alleged securitization, and any other subsequent  
 11 transfers of the beneficial interest under the promissory note, [the  
 12 borrower] lacks standing to enforce any agreements, including the  
 13 investment trust's pooling and servicing agreement, relating to such  
 transactions.... [¶] Furthermore, even if any subsequent transfers ...  
 14 were invalid, [the borrower] is not the victim of such invalid transfers  
 15 because her obligations under the note remained unchanged.

16 216 Cal. App. 4th 497, 515 (2013) (internal citations omitted).

17 Similarly, Plaintiffs cannot assert any claims premised upon the validity or  
 18 invalidity of either Assignment of the Deed of Trust. "Plaintiffs do not have  
 19 standing to challenge the Assignment of [the Deed of Trust] because they are not  
 20 parties or third-party beneficiaries to it." *Reyes-Aguilar v. Bank of Am.*, 2014 U.S.  
 21 Dist. LEXIS 37036, at \*15 (N.D. Cal. 2014); *accord Erlinda Abibas Aniel v. GMAC*  
 22 *Mortg., LLC*, 2012 U.S. Dist. LEXIS 157792, at \*13-14 (N.D. Cal. 2012); *Ganesan*  
 23 *v. GMAC Mortg., LLC*, 2012 U.S. Dist. LEXIS 148225, at \*12 (N.D. Cal. 2012)  
 24 (same); *Penney v. Wells Fargo Bank, NA*, 2012 U.S. Dist. LEXIS 78794 (C.D. Cal.  
 25 2012) (same, collecting cases).

26 Even if there were defects or errors in either assignment, "[d]efects in  
 27 transfers do not injure the borrower because even if there were some defect in the  
 28 subsequent assignment of the deed of trust, that assignment would not change  
 plaintiff's payment obligations." *Chen v. Deutsche Bank Nat'l Trust Co.*, 2014 U.S.

1 Dist. LEXIS 164452, at \*13 (N.D. Cal. Nov. 24, 2014) (quotations and brackets  
2 omitted).

### 3 **VI. PLAINTIFFS' CANCELLATION CLAIM FAILS.**

#### 4 **A. Plaintiffs Failed to Tender their Outstanding Indebtedness.**

5 Plaintiffs seek to cancel the two Assignments, the Notice of Default, a  
6 Substitution of Trustee, and the Notice of Trustee's Sale. Compl., ¶ 42. The law is  
7 well-settled that a party cannot quiet title, enjoin the power of sale, or seek  
8 cancellation without paying the underlying debt. *See, e.g., Weger v. Rocha*, 138  
9 Cal. App. 109, 116 (1934) ("in the cancellation or rescission of contracts, it is  
10 incumbent upon the parties seeking rescission to restore everything of value that has  
11 been received."). Further, to constitute a valid tender, "the tenderer must do and  
12 offer everything that is necessary on his part to complete the transaction, and must  
13 fairly make known his purpose without ambiguity, and the act of tender must be  
14 such that it needs only acceptance by the one to whom it is made to complete the  
15 transaction." *Gaffney v. Downey Savings & Loan Ass'n*, 200 Cal. App. 3d 1154,  
16 1165 (1988).

17 Here, Plaintiffs make no claim whatsoever that they tendered their  
18 outstanding indebtedness. *See, e.g.,* Compl., ¶¶ 40-43. Accordingly, Plaintiffs'  
19 claim fails to the extent they may seek to cancel the Note or Deed of Trust on the  
20 basis of the allegedly invalid Assignments.

#### 21 **B. Plaintiffs Fail to Plead the Required Elements of Cancellation.**

22 In addition to the fact that Plaintiffs failed to tender (or even allege tender),  
23 Plaintiffs also fail to meet the elements of an equitable claim for cancellation.  
24 Specifically, a plaintiff must allege: (1) reasonable apprehension that the instrument  
25 left standing might cause serious injury to the plaintiff; (2) the instrument is valid on  
26 its face; (3) the instrument is void or voidable; (4) the instrument was in existence or  
27 under the defendant's possession and control when the action was filed; and (5) if  
28

the interest is voidable rather than void, that the plaintiff acted promptly to rescind. Cal. Civ. Code §§ 3412, 3413; *Hironymous v. Hiatt*, 52 Cal. App. 727,731 (1921).

The failure to plead any one of these necessary elements renders a claim fatally defective. Yet here, Plaintiffs do not allege *any* of the five required elements (outside of the bald conclusion that the documents “are void for the reasons stated herein” (Compl., ¶ 42) which is entitled to no weight). Therefore, the claim must fail.

## VII. PLAINTIFFS’ UCL CLAIM FAILS.

Plaintiffs’ second claim for UCL violations also must fail. A claim under the UCL requires the allegation of *particular* facts showing ongoing unlawful, unfair, or fraudulent business acts on the part of the defendant. *Khoury v. Maly’s of Cal., Inc.*, 14 Cal. App. 4th 612, 619 (1993).

Here, Plaintiffs simply assert that “Defendants have engaged in unfair, unlawful, and fraudulent business practices in the State of California” and that “Defendants have violated Cal. Penal Code § 115 and § 532(f)(a)(4) by filing or causing the Assignments to be filed with the Orange County Recorder in connection with Plaintiffs’ Mortgage Loan transaction with knowledge that the Assignment contained deliberate misstatements and misrepresentations.” Compl., ¶¶ 45, 48. Plaintiffs’ failure to differentiate between any of the Defendants and their purported conduct violates Rule 8, and the claim should be dismissed for this reason alone. *See In re Sagent Tech, supra*.

### A. Plaintiffs Lack Standing

In addition to their inability to state a claim for unlawful, unfair, or fraudulent business acts (*infra*), Plaintiffs also lack standing to assert a claim under the UCL. To establish standing to assert a UCL claim, as amended by Proposition 64, “[a] private plaintiff must make a twofold showing: he or she must demonstrate injury in fact and a loss of money or property caused by unfair competition.” *Peterson v. Celco P’ship*, 164 Cal. App. 4th 1583, 1590 (2008). A plaintiff must allege a

1 “distinct and palpable injury,” one that is “concrete and particularized” and “not  
2 conjectural or hypothetical.” *Id.* Further, a plaintiff cannot show he suffered “injury  
3 in fact” or “lost money” when he received the benefit of his bargain. *Id.* at 1591-92.

4 Here, Plaintiffs cannot satisfy the standing requirement of the UCL.  
5 Specifically, they have not alleged any actual misconduct by BANA that led to their  
6 purported injuries, which include their inability “to know whether [any buyer of  
7 Plaintiffs’ home] can safely buy Plaintiffs’ home or get title insurance...; whether  
8 [Plaintiffs] sent their monthly mortgage payments to the right party; and their  
9 expenditure of “significant funds to cover the cost of attorneys’ fees and related  
10 costs.” Compl., ¶ 60. None of these purported harms are concrete and  
11 particularized, but are rather hypothetical. Additionally, attorney’s fees incurred in  
12 bringing a UCL claim are not sufficient to establish economic injury required to  
13 confer standing under the UCL. *See, e.g., Cordon v. Wachovia Mortg.*, 776 F. Supp.  
14 2d 1029, 1039 (N.D. Cal. 2011).

15 Plaintiffs further allege that “a cloud has been placed upon title to Plaintiffs’  
16 Property” and that Plaintiffs “are unable to determine whether they sent their  
17 monthly mortgage payments to the right party[.]” Compl., ¶¶ 58-59. However,  
18 Plaintiffs expressly admit to executing the Deed of Trust that encumbers the  
19 Property. Compl., ¶ 16. Thus, they directly received the benefit of their bargain – a  
20 \$1,435,000.00 loan that enabled them to refinance the Property – and any harm  
21 stemming therefrom has been caused *only* by Plaintiffs’ failure to pay their  
22 obligations under their loan. Moreover, Plaintiffs do not allege that they made  
23 payments to a loan servicer for which they were not credited. They simply fail to  
24 allege any actual loss of money or property they have incurred as a result of the  
25 allegedly improper Assignments. Accordingly, they have in no way alleged any  
26 injury that is “concrete and particularized” and “not conjectural or hypothetical.”  
27 *Peterson, supra.*

28



1           **B. Plaintiffs cannot state a Claim for “Unlawful” Acts or Practices.**

2            “[A]n action based on [the UCL] to redress an unlawful business practice  
3 ‘borrows’ violations of other laws and treats these violations ... as unlawful  
4 practices, independently actionable under section 17200 et seq. and subject to the  
5 distinct remedies provided thereunder.” *Farmers Ins. Exch. v. Super. Ct.*, 2 Cal.4th  
6 377, 383 (1992) (quotations and citations omitted). If a claim cannot be stated under  
7 the “borrowed” law, a UCL claim cannot be stated either. *Ingels v. Westwood One*  
8 *Broad. Servs., Inc.*, 129 Cal. App. 4th 1050, 1060 (2005).

9            Here, as set forth herein, Plaintiffs cannot allege any violations of underlying  
10 statutes or common law upon which the UCL claim could stand. First they allege  
11 that BANA has violated Sections 115 and 532 of the California Penal Code by filing  
12 or causing to be filed the allegedly fraudulent Assignments. Compl., ¶ 48. Section  
13 115 of the California Penal Code forbids the filing, registering, or recording of “any  
14 false or forged instrument” in any state public office. Cal. Penal Code § 115(a).  
15 Section 532 of the California Penal Code addresses the crime of obtaining money or  
16 property by “any false or fraudulent representation or pretense.” Cal. Penal Code §  
17 532(a). Yet these statutes do not explicitly provide for a private right of action. *See*  
18 *Wallace v. Mortg. Elec. Registration Sys.*, 2012 U.S. Dist. LEXIS 3977, at \*3 (C.D.  
19 Cal. Jan. 11, 2012). “[A] private right of action exists only if the language of the  
20 statute or its legislative history clearly indicates the Legislature intended to create  
21 such a right to sue for damages.” *Vikco Ins. Servs., Inc. v. Ohio Indem. Co.*, 70 Cal.  
22 App. 4th 55, 62 (1999). “If the Legislature intends to create a private cause of  
23 action, we generally assume it will do so directly[,] . . . in clear, understandable,  
24 unmistakable terms.” *Id.* at 62-63 (internal quotation marks and citations omitted).

25            Here, Plaintiffs have not shown that the penal code section in question was  
26 intended by the legislature to create mandatory duties to prevent the particular  
27 injuries Plaintiffs allegedly suffered. *See Michael R. v. Jeffrey B.*, 158 Cal. App. 3d  
28 1059, 1066 (1984); *see also Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979)

(finding that a private right of action under a criminal statute has rarely been implied and where a private right of action has been implied, “there was at least a statutory basis for inferring that a civil cause of action of some sort lay in favor of someone”) (internal citations omitted). Accordingly, they cannot premise an “unlawful” UCL claim on these allegations. *See Krantz v. BT Visual Images, L.L.C.*, 89 Cal. App. 4th 164, 178 (A claim under the UCL is “incidental to and depend[s] upon the validity (or invalidity) of the preceding claims for relief,” and therefore stands or falls “depending on the fate of the antecedent substantive causes of action.”).

**C. Plaintiffs cannot state a Claim for “Unfair” Acts or Practices.**

To state a claim under the “unfair” prong of the UCL, a plaintiff must suffer a consumer injury, and “(1) [t]he consumer injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition; and (3) it must be an injury that consumers themselves could not reasonably have avoided.” *Davis v. Ford Motor Credit Co.*, 179 Cal. App. 4th 581, 598 (2009).

Here, Plaintiffs fail to meet these required elements. First, they fail to allege that they suffered an actual injury. Next, Plaintiffs fail to allege any facts showing that any purported injury was caused by “Defendants,” let alone that such injury was caused by *BANA*, or that it was substantial. Further, Plaintiffs’ alleged injury, directly caused by their own failure to make their loan payments, is strongly outweighed countervailing benefits – both consumers and competition receive substantial benefit from a system that enforces parties’ contractual obligations and that requires adherence to these obligations without punishing the non-breaching party from pursuing the security under the contracts. Thus, they cannot state a claim under the “unfair” prong of the UCL.

**D. Plaintiffs cannot state a Claim for “Fraudulent” Acts or Practices.**

Finally, Plaintiffs fail to allege a valid claim for “fraudulent” acts or practices under the UCL. As stated above, any claim under the UCL must be pleaded with particularity. Additionally, a claim under the UCL “cannot be predicated on



1 vicarious liability.... A defendant's liability must be based on his personal  
 2 participation in the unlawful practices and unbridled control over the practices that  
 3 are found to violate [the UCL]." *Emery v. Visa Int'l Serv. Assoc.*, 95 Cal. App. 4th  
 4 952, 960 (2002) (internal quotation marks and citations omitted). Here, none of the  
 5 alleged misconduct is pleaded with the required particularity, nor do Plaintiffs  
 6 identify any actions taken by BANA individually. Compl., ¶¶ 44-60. This failure to  
 7 differentiate between the various defendants and their individualized wrongful  
 8 conduct, which runs afoul of the particularity requirement and the personal  
 9 participation requirement under the UCL, is fatal to Plaintiffs' UCL claim.

10 Moreover, the "fraudulent" prong, post-enactment of Proposition 64, applies  
 11 where a business act or practice actually misleads a plaintiff. *See Hall v. Time, Inc.*,  
 12 158 Cal. App. 4th 847, 849 (2008). To satisfy this "actual reliance" requirement, a  
 13 private plaintiff must allege that a defendant's actions were an "immediate cause of  
 14 the injury-producing conduct." *In re Tobacco II Cases*, 46 Cal. 4th 298, 326 (2009)  
 15 (internal quotation marks and citation omitted). When the pleaded facts "do not  
 16 naturally give rise to an inference of causation the plaintiff must plead specific facts  
 17 affording an inference the one caused the other[]." *Animal Legal Defense Fund v.*  
 18 *Mendes*, 160 Cal. App. 4th 136, 146 (2008) (internal quotation marks and citations  
 19 omitted).

20 Here, Plaintiffs have not alleged that any actions taken by BANA were the  
 21 immediate cause of any injury-producing conduct; rather, it was Plaintiffs' own  
 22 failure to pay their loan obligations that caused their injury. In addition, Plaintiffs  
 23 do not allege that they were actually misled by any act or practice of BANA. Thus,  
 24 they also cannot state a "fraudulent" UCL claim.

## 25 **VIII. THE CLAIMS FOR VIOLATION OF CAL. CIV. CODE §2924 FAILS.**

26 Plaintiffs allege that BANA violated Section 2924(a)(6) of the California  
 27 Civil Code by causing to be recorded a Notice of Default without holding the  
 28 beneficial interest under the Deed of Trust. Compl., ¶ 62. Plaintiffs further allege in

1 broad terms – with no explanation whatsoever – that this notice of default also  
2 violates Section 2924(f). Compl., ¶ 64. However, Plaintiffs’ claim fails.

3 Section 2924(a)(6) prohibits an entity from recording or causing “a notice of  
4 default to be recorded . . . unless it is the holder of the beneficial interest under the  
5 mortgage or deed of trust....” Cal. Civ. Code § 2924(a)(6). Even if any violation  
6 had occurred with respect to this statute, it does not involve BANA. Rather, the  
7 Notice of Default expressly reveals that such notice was recorded by the trustee on  
8 behalf of SPS, the Loan’s servicer. *See* RJN, Ex. E. Accordingly, the Notice of  
9 Default does not implicate any act or omission by BANA, and for the same reason,  
10 any other statutory violations tied to the Notice of Default must fail against BANA.

11 **IX. THE CLAIMS FOR VIOLATION OF CAL. CIV. CODE §§ 2923.5 AND**  
12 **2923.55 FAIL AGAINST BANA.**

13 Under California’s non-judicial foreclosure statutes, a mortgage servicer,  
14 mortgagee, trustee beneficiary, or authorized agent may not record a notice of  
15 default until the servicer has made actual contact with the borrower to discuss  
16 foreclosure alternatives, or until the servicer has attempted with due diligence to  
17 contact the borrower to discuss foreclosure alternatives. *See* Cal. Civil Code §§  
18 2923.5(a)(2), 2923.55(b)(2). The Notice of Default is also required to contain a  
19 declaration of compliance with the statute. *See* Cal. Civil Code §§ 2923.5(b),  
20 2923.55(c).

21 In support of their claim for violation of these provisions, Plaintiffs claim that  
22 “none of the Defendants nor their representatives contacted the Plaintiffs to discuss  
23 their financial condition and the impending foreclosure.” Compl., ¶ 68. Plaintiffs  
24 also allege that the Notice of Default did not contain the required declaration and  
25 was therefore noncompliant with these provisions “because Plaintiffs were never  
26 contacted by NDS or any other servicer, nor received any correspondence before the  
27 Notice of Default was recorded.” Compl., ¶ 70.

28

1 In this case, however, BANA cannot be held liable under these provisions, as  
2 the statute imposes such requirements on the loan servicer. *See* Cal. Civil Code §§  
3 2923.5(a)(2), (b); 2923.55(b)(2), (c). Judicially noticeable documents demonstrate  
4 that BANA was not the loan servicer at the time the allegedly offending Notice of  
5 Default was recorded. *See* RJN, Ex. E. Accordingly, this claim is not actionable  
6 against BANA and should be dismissed.

7 **X. CONCLUSION**

8 Not taking into account the multiple bankruptcy actions filed by Plaintiffs,  
9 this is the second civil action filed by Plaintiffs in an attempt to stall foreclosure  
10 proceedings. When they received a ruling in the prior action that was not to their  
11 liking, they simply dismissed it and refiled it in this Court. BANA, who has no  
12 ability to halt or postpone any foreclosure proceedings (as it is not the servicer), has  
13 been forced to defend yet another frivolous action here. Accordingly, Bank of  
14 America, N.A. respectfully requests that the Court grant its motion to dismiss the  
15 action in its entirety, with prejudice.

16  
17 DATED: July 23, 2015

Respectfully submitted,

18 MCGUIREWOODS LLP  
19

20  
21 By: /s/ Adam F. Summerfield

22 Adam F. Summerfield

23 Attorneys for Defendant

24 Bank of America, N.A.  
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**CERTIFICATE OF SERVICE**

I hereby certify that on July 23, 2015, I electronically filed the foregoing document entitled **BANK OF AMERICA, N.A.’S NOTICE OF MOTION AND MOTION TO DISMISS; MEMORANDUM OF POINTS AND AUTHORITIES** with the Clerk of the Court for the United States District Court, Central District of California using the CM/ECF system and served a copy of same upon all counsel of record via the Court’s electronic filing system.

By: /s/ Adam F. Summerfield